

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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|---------------------|---|------------------------|
| MICHAEL ROMANO | : | |
| Petitioner | : | |
| v. | : | Civ. No. 23-2919 |
| | : | Honorable Christine P. |
| | : | O’Hearn |
| WARDEN, FCI FAIRTON | : | |
| Respondent | : | |
| | : | |

**AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT
TO 28 U.S.C. § 2241, REQUEST FOR ORDER OF BAIL AND DISCOVERY**

PRELIMINARY STATEMENT

1. Petitioner-Plaintiff Michael Romano is a 56-year-old son and fiancée who was released by the Federal Bureau of Prisons (“BOP”) under the CARES Act to home confinement, for what he was told would be the remainder of his sentence if he followed all of the rules. Mr. Romano applied for a job and health insurance, renewed expired documents, set up medical appointments, and generally settled into life at home. He deeply reconnected with his elderly mother, his fiancée, and many other family members.
2. Despite Mr. Romano’s hard work and progress towards reintegration into the community, and complete compliance with all aspects of his terms of release, the BOP returned him to institutional custody one month later,

without even providing the reasons for his remand and without a hearing where he could understand the evidence against him, counter that evidence, and advocate that separation from his family and established community ties was not required.

3. Eventually he was told the BOP made a mistake in releasing him before he had served 50 percent of his sentence. He was just a few months shy of 50 percent.
4. Although BOP staff assured him that he would again be released when he had served 50 percent, his application was stalled and ultimately denied when the AUSA objected to his release.
5. This reimprisonment devastated Mr. Romano and his family, but particularly his elderly mother. Her health has deteriorated, she continues to take dangerous falls, resulting in broken bones and other injury, and she sinks into deeper depression.
6. In addition, Mr. Romano will not be able to conceive a child with his fiancée as they need to work with a fertility clinic, which is not possible during his incarceration.
7. The BOP took the drastic action of removing him from home confinement without ever providing him notice, a fair hearing in front of a neutral decisionmaker, where he could question the grounds for remand and provide

evidence about why that course of action was incorrect in violation of his rights to procedural due process. Moreover, without any evidence justifying its decision, the BOP also violated Mr. Romano's substantive due process rights.

8. Mr. Romano petitions this Court for a Writ of Habeas Corpus to remedy his unlawful detention, seeks an order of bail pending a decision on the underlying petition, and seeks an order for leave to conduct limited discovery.

PARTIES

9. The parties to this petition are Michael Romano, an inmate at FCI Fairton, and the Warden of FCI Fairton.

JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to Article I, § 9, cl. 2 of the U.S. Constitution and 28 U.S.C. § 2241.
11. Venue is proper in the District of New Jersey because Petitioner-Plaintiff resides in the District of New Jersey through his custody at the camp at FCI Fairton. 28 U.S.C. § 1391(b).

EXHAUSTION

12. Mr. Romano exhausted his administrative remedies on April 24, 2023, by completing and receiving responses on his BP-9, BP-10, and BP-11 forms. *See Exhibit 1 (Exhaustion Documents).*¹

FACTUAL ALLEGATIONS

13. Mr. Romano was on home confinement while serving a sentence out of the Eastern District of New York.
14. Mr. Romano was sentenced on February 27, 2014 to a term of 240 months' incarceration after being convicted by a jury of conspiracy to commit mail fraud and money laundering. Crim. No. 09-168 (E.D.N.Y.) He was on pretrial release for over five-and-one-half years without any incident. He surrendered to FCI Fort Dix on April 26, 2014.
15. Home confinement is a program of the BOP whereby individuals serving a federal sentence are released from prison earlier than the expiration of their imposed sentence. 18 U.S.C. § 3624(c). Home confinement is intended to “afford [a] prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.” 18 U.S.C. § 3624(c)(1).
16. On March 27, 2020, due to the COVID-19 pandemic, Congress enacted the

¹ A Certification of Counsel is submitted with the instant Amended Petition and Memorandum of Law setting forth the Exhibits that are filed in support of Mr. Romano's application.

Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136, § 12003(b)(2) (2020), which expanded the authority of the BOP to place individuals on home confinement under 18 U.S.C. § 3624(c)(2)—previously capped at the shorter of 10% of their sentence or 6 months—provided that the Attorney General makes a finding that “emergency conditions will materially affect the functioning of the Bureau.”

17. Attorney General Barr made that finding on April 3, 2020. He issued a memorandum, noting the Bureau’s “profound obligation to protect the health and safety of all inmates” and directed the BOP to “move with dispatch in using home confinement, where appropriate, to move vulnerable inmates out of these institutions.”²

18. At the time the COVID pandemic hit, Mr. Romano was still serving his sentence at FCI Fort Dix and was there during the worst COVID-19 outbreak in the federal prison system in December 2020 to January 2021. *See* Exhibit 2 (Declaration of Michael Romano (“Romano Decl.” ¶ 10).

19. Mr. Romano closely followed the laws, regulations, and guidance on COVID-19 and CARES Act home confinement. *Id.* at ¶ 11.

20. In July 2021, Mr. Romano was transferred to the camp at FCI Fairton.

² Office of the Attorney General, Memorandum for Director of Bureau of Prisons (Apr. 3, 2020), *available at* <https://www.justice.gov/file/1266661/download>.

21. Around February 2022, he was notified he qualified to move to home confinement under the CARES Act. He had medical issues that made him more vulnerable to COVID-19 and a spotless prison record.
22. Closer to release, Mr. Romano signed various forms about the requirements for release to home confinement. Exhibit 3 (Conditions of Home Detention, Community Based Program Agreement, Home Confinement and Community Control Agreement).³ He was also told he would not return to prison if he followed all of the rules. Exh. 2, Romano Decl. ¶ 14.
23. Just before he was released to home confinement, Mr. Romano learned that the United States Attorney's Office objected to his release. *Id.*
24. The BOP released Mr. Romano on June 22, 2022. His prison sentence was set to expire on May 10, 2031, although that date has moved forward to May 10, 2030 based on First Step Act credits. Exhibit 4 (Sentence Monitoring Computation Data).
25. On June 22, 2022, Mr. Romano moved home with his sister and her husband, and reestablished strong ties with his fiancée and elderly mother. Exhibit 5 (Letters from Celia Wells and Kevin Wells); Exhibit 6 (Letter from Ruta Monika Bettex).

³ Counsel attaches copies of the three documents Mr. Romano signed in October 2022 but she has no reason to think they were not identical to the documents he signed in June 2022.

26. He worked diligently to quickly reestablish himself, applying for a job, and obtaining health insurance, medical care, a bank account, a phone and plan, all necessary documentation. He also went through the steps to get permission to use a car. Exh. 2, Romano Decl. ¶¶ 19-20.
27. Throughout his time on home confinement, he was supervised by CORE Brooklyn House Residential Reentry Center (“Brooklyn House”). He never violated any conditions nor did he receive any incident reports. *Id.* at ¶¶ 16, 21.
28. Nonetheless, on July 18, 2022, Mr. Romano was told to report to Brooklyn House. No one would give him any information and he was made to sleep there overnight until the Marshals picked him up the next morning. He spent several weeks at MDC Brooklyn and another several weeks in the solitary housing unit at FCI Fairton until he returned to the camp at FCI Fairton on August 22, 2022. *Id.* at ¶¶ 26-29. He learned through a conversation with the camp administrator that he was returned to institutional confinement because he had not served 50 percent of his sentence. *Id.* at ¶ 30.
29. Before being removed from home confinement, he did not receive oral or written notice of the reason he was being remanded back to institutional confinement nor that he would be imprisoned. He had no opportunity to view the evidence that supported the BOP’s decision, for a hearing before a

decisionmaker to present witnesses and evidence, or to cross-examine adverse witnesses. Nor did he receive a written statement as to the evidence relied on and reasons for revoking his home confinement.

30. Once Mr. Romano informally learned the reason the BOP remanded him to institutional confinement, he was told his application would be resubmitted when he had served 50 percent of his sentence. *Id.* at ¶¶ 30-31. In October 2022, he again signed forms detailing the requirements of home confinement. Exh. 3.
31. By November 1, 2022, Mr. Romano completed 50 percent of his sentence, and waited for the RRC to give him a date so that he could again be released to home confinement.
32. On January 3, 2023, he learned he was denied release because the United States Attorney's Office objected to his release. Exh. 2, Romano Decl. ¶¶ 38-39.
33. Mr. Romano began the administrative grievance process which was complete on April 24, 2023. Exh. 1.
34. On April 10, 2023, President Biden signed H.J. Res. 7 ending the COVID-19 national emergency. Under § 12003(a) and (b)(2) of the CARES Act, the BOP's authority to place inmates on CARES Act home confinement expired on May 10, 2023.

35. Mr. Romano's continued incarceration will cause irreparable harm to his family. His separation and return to institutional confinement has devastated his elderly mother, whose physical and emotional health is deteriorating. She is very depressed and now physical unstable, taking numerous serious falls resulting in broken bones, hospital trips, medical follow-up. Exhibit 7 (Declaration of Celia Wells ¶¶ 4-5); Exhibit 8 (Declaration of Ruta Monika Bettex ¶¶ 4-5). Continued separation will cause his fiancée to be unable to pursue fertility treatments and conceive. Exh. 6.

COUNT ONE
(Violation of Procedural Due Process)

36. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.
37. Mr. Romano has a liberty interest, protected by the Due Process Clause, in remaining on home confinement.
38. Under the Due Process Clause, before revoking Mr. Romano's home confinement, the BOP was required to provide him with (1) written notice of the reason for its remand; (2) disclosure of the evidence against him; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a "neutral and detached" hearing body; and (f) a written statement by the

hearing body as to the evidence relied on and reasons for revoking home confinement. *See Young v. Harper*, 520 U.S. 143 (1997); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

COUNT TWO
(Violation of Substantive Due Process)

39. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.
40. Mr. Romano has a liberty interest, protected by the Due Process Clause of the Fifth Amendment, in remaining on home confinement.
41. The BOP's reason for returning Mr. Romano from home confinement to institutional confinement, that he had not completed 50 percent of his sentence, has no basis in fact. At no time was 50 percent a hard and fast requirement for release. *See* Exhibit 9 (Declaration of Hugh J. Hurwitz ¶ 25); Exhibit 10 (Biography of Hugh J. Hurwitz).
42. Under the CARES Act, the BOP released nearly 600 persons who had not served more than 50 percent of their sentence nor more than 25 percent of their sentence with less than 18 months remaining. Exhibit 11 (Declaration of Allison Bruning ¶ 14). Of those 573 inmates, seven were released from FCI Fairton between March 29, 2020 and January 29, 2022. *See* Exhibit 12

(Cover Letter from BOP to ACLU detailing data produced as a result of FOIA litigation, # 2021-06841-LIT); Exhibit 13 (Data Set Produced through # 2021-06841-LIT which includes 9,092 inmates); Exhibit 14 (Data of 74 inmates excluded from # 2021-06841-LIT list because of obvious error).

43. The BOP's decision to separate Mr. Romano from his family without a "basis in fact," *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), violates substantive due process because it is arbitrary, or conscience shocking, in a constitutional sense," *Collins v. Harker Heights*, 502 U.S. 115, 128 (1992).

REQUEST FOR BAIL AS A PROVISIONAL REMEDY

44. Federal district courts have authority, when habeas actions are pending, to "enlarge" the custody of petitioners. Enlargement or bail is a provisional remedy that modifies custody by expanding the site at which it takes place, upon order of the court, from a particular prison to another setting. This power stems from Congress' authorization of federal judges under the habeas statutes to "summarily hear and determine the facts, and dispose of the matter as law and justice require" as well as the courts' inherent powers. *See* 28 U.S.C. § 2243.

45. To qualify for bail, an individual must establish a substantial constitutional claim upon which he has a high likelihood of success and also extraordinary circumstances. *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992).
46. Mr. Romano currently has “Community Custody,” the lowest possible custody classification in the BOP. Exhibit 15 (Male Custody Classification Form). The BOP assesses his risk for general and violent recidivism in the lowest possible range, “Minimum,” and he scores in the negative points on these scales. Exhibit 16 (FSA Recidivism Risk Assessment (PATTERN)).
47. Mr. Romano raises substantial claims, as he was summarily imprisoned by the BOP without a valid reason and with no notice or opportunity to challenge the revocation.
48. Extraordinary circumstances exist given that Mr. Romano’s continued imprisonment will cause irreparable harm to his elderly mother and to his fiancée who will require reproductive assistance from a fertility clinic to get pregnant and requires Mr. Romano’s presence in the community for this.
Exhs. 6-7.
49. Mr. Romano requests that the Court enlarge his custody to permit him to live again with his sister and care for his mother, subject to the restrictions in place prior to his re- imprisonment and relies on the attached motion in support.

REQUEST FOR A LIMITED ORDER OF DISCOVERY

50. Discovery is authorized in Rule 6(a) of the Rules Governing Section 2254

Cases in the United States District Court only by leave of court upon a showing by the petitioner of “good cause.” A petitioner must provide the Court with “specific allegations” that “show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief[.]” *Harris v. Nelson*, 394 U.S. 286, 300 (1969); *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997).

51. Mr. Romano shows good cause and, as required by Habeas Rule 6(b), specifies six categories of requested documents in the BOP’s possession that substantiate his due process claims.

52. In support of his discovery request, he relies on the attached motion.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that the Court:

- (a) Grant bail to Mr. Romano pending disposition of the underlying habeas petition;
- (b) Grant a limited order for discovery;
- (c) Grant a writ of Habeas Corpus requiring Respondent to release Mr. Romano immediately, pursuant to 28 U.S.C. § 2243; and
- (d) Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

Dated: October 20, 2023

/s/ Alison Brill

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